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NouHgt Technologies, LLC*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Nevada Select Royalty, Inc.,
Plaintiff,

vs.

Jerritt Canyon Gold LLC,
Defendant.

Case Number: 3:22-cv-00415-LRH-CSD

**COUNTERDEFENDANT NOUHGT
TECHNOLOGIES, LLC'S ANSWER TO
JERRITT CANYON GOLD, LLC'S
COUNTERCLAIMS**

AND

Jerritt Canyon Gold LLC,
Counterclaimant,

vs.

Nevada Select Royalty, Inc.; and NouHgt
Technologies, LLC,
Counterdefendants.

**NOUHGT TECHNOLOGIES, LLC'S
COUNTERCLAIMS AGAINST
JERRITT CANYON GOLD, LLC**

NouHgt Technologies, LLC,
Counterclaimant,

vs.

Jerritt Canyon Gold LLC, a Nevada limited

liability company; DOE I through X,
inclusive; ROE ENTITIES I through X,
inclusive,

Counterdefendants.

Counterdefendant/Counterclaimant NouHgt Technologies, LLC (“NouHgt”) as and
for its Answer, Affirmative Defenses, and Counterclaims to Defendant Jerritt Canyon Gold
LLC’s (“Jerritt”) Counterclaims, does hereby state as follows:

ANSWER TO JERRITT’S COUNTERCLAIMS

1. In responding to paragraph 55 of Jerritt’s Counterclaims, NouHgt avers that
the allegations therein call for legal conclusions to which no response is required. To the
extent a response is deemed necessary, NouHgt is without knowledge or information
sufficient to form a belief as to the truth of the allegations contained therein, and therefore,
denies the same.

PARTIES

2. In responding to paragraph 56 of Jerritt’s Counterclaims, NouHgt is without
knowledge or information sufficient to form a belief as to the truth of the allegations
contained therein, and therefore, denies the same.

3. In responding to paragraph 57 of Jerritt’s Counterclaims, NouHgt avers that
the referenced document speaks for itself and denies any allegation inconsistent therewith.
As to the remaining allegations, NouHgt is without knowledge or information sufficient to
form a belief as to the truth of the allegations contained therein, and therefore, denies the
same.

4. In responding to paragraph 58 of Jerritt’s Counterclaims, NouHgt admits the
allegations therein.

JURISDICTION AND VENUE

5. In responding to paragraph 59 of Jerritt’s Counterclaims, NouHgt avers that
these allegations call for legal conclusions to which no response is required. To the extent a

1 response is deemed necessary, NouHgt is without knowledge or information sufficient to
2 form a belief as to the truth of the allegations contained therein, and therefore, denies the
3 same.

4 **GENERAL FACTUAL ALLEGATIONS**

5 6. In responding to paragraph 60 of Jerritt's Counterclaims, NouHgt admits that
6 Jerritt Canyon is successor-in-interest to the Licensee of the Amended Agreement to license
7 the Patent for use in mining operations at the Jerritt Canyon Mine in Elko County, Nevada.
8 NouHgt, however, denies the allegation that the Patent's purported benefits are limited to
9 "improved mercury removal during the mining manufacturing process." NouHgt further
10 denies the allegation that the "purported novelty of the Patent" was limited to its
11 specification of "a certain pH range." As to the remaining allegations, NouHgt is without
12 knowledge or information sufficient to form a belief as to the truth of the allegations
13 regarding Jerritt's status, and therefore, denies the same. NouHgt denies all remaining
14 allegations therein.

15 7. In responding to paragraph 61 of Jerritt's Counterclaims, NouHgt admits that
16 Jerritt utilized the process taught by the Patent. NouHgt is without knowledge or information
17 sufficient to form a belief as to the truth of the remaining allegations contained therein, and
18 therefore, denies the same.

19 8. In responding to paragraph 62 of Jerritt's Counterclaims, NouHgt is without
20 knowledge or information sufficient to form a belief as to the truth of the allegations
21 contained therein, and therefore, denies the same.

22 9. In responding to paragraph 63 of Jerritt's Counterclaims, NouHgt is without
23 knowledge or information sufficient to form a belief as to the truth of the allegations
24 contained therein, and therefore, denies the same.

25 10. In responding to paragraph 64 of Jerritt's Counterclaims, NouHgt avers that
26 these allegations call for legal conclusions to which no response is required. To the extent a
27 response is deemed necessary, NouHgt is without knowledge or information sufficient to

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1 form a belief as to the truth of the allegations contained therein, and therefore, denies the
2 same.

3 **[JERRITT'S] FIRST COUNTERCLAIM**

4 **DECLARATION OF NON-INFRINGEMENT**

5 11. In responding to paragraph 65 of Jerritt's Counterclaims, NouHgt reasserts,
6 realleges, and incorporates by this reference all prior responses as though fully set forth
7 herein.

8 12. In responding to paragraph 66 of Jerritt's Counterclaims, NouHgt admits that
9 Jerritt stated to NouHgt and Nevada Select that Jerritt was no longer utilizing the patented
10 process and is without knowledge or information sufficient to form a belief as to the truth of
11 the remaining allegations contained therein, and therefore, denies the same.

12 13. In responding to paragraph 67 of Jerritt's Counterclaims, NouHgt avers that
13 these allegations call for legal conclusions to which no response is required. To the extent a
14 response is deemed necessary, NouHgt denies the remaining allegations contained therein.

15 14. In responding to paragraph 68 of Jerritt's Counterclaims, NouHgt denies the
16 allegations therein.

17 **[JERRITT'S] SECOND COUNTERCLAIM**

18 **DECLARATION THAT THE PATENT IS INVALID AND UNENFORCEABLE**

19 15. In responding to paragraph 69 of Jerritt's Counterclaims, NouHgt reasserts,
20 realleges, and incorporates by this reference all prior responses as though fully set forth
21 herein.

22 16. In responding to paragraph 70 of Jerritt's Counterclaims, NouHgt avers that
23 these allegations call for legal conclusions to which no response is required. To the extent a
24 response is deemed necessary, NouHgt denies that any of the Patent's claims is invalid for
25 any reason. As to the remaining allegations, NouHgt is without knowledge or information
26 sufficient to form a belief as to the truth of those allegations, and therefore, denies the same.

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1 17. In responding to paragraph 71 of Jerritt's Counterclaims, NouHgt avers that
2 the referenced document speaks for itself and denies any allegation inconsistent therewith.
3 As to the remaining allegations, NouHgt avers that these allegations call for legal
4 conclusions to which no response is required. To the extent a response is deemed necessary,
5 NouHgt denies that the Patent specification is indefinite and that any of the Patent's claims
6 is invalid.

7 18. In responding to paragraph 72 of Jerritt's Counterclaims, NouHgt avers that
8 these allegations call for legal conclusions to which no response is required. To the extent a
9 response is deemed necessary, NouHgt denies that any of the Patent's claims is invalid for
10 any reason, including, without limitation, due to anticipation, obviousness, or indefiniteness.

11 19. In responding to paragraph 73 of Jerritt's Counterclaims, NouHgt denies the
12 allegations therein.

13 **[JERRITT'S] THIRD COUNTERCLAIM**

14 **DECLARATION THAT THE PATENT IS INVALID FOR PATENT MISUSE**

15 20. In responding to paragraph 74 of Jerritt's Counterclaims, NouHgt reasserts,
16 realleges, and incorporates by this reference all prior responses as though fully set forth
17 herein.

18 21. In responding to paragraph 75 of Jerritt's Counterclaims, NouHgt avers that
19 these allegations call for legal conclusions to which no response is required. To the extent a
20 response is deemed necessary, NouHgt is without knowledge or information sufficient to
21 form a belief as to the truth of the allegations contained therein, and therefore, denies the
22 same.

23 22. In responding to paragraph 76 of Jerritt's Counterclaims, NouHgt avers that
24 the referenced document speaks for itself and denies any allegation inconsistent therewith.
25 As to the remaining allegations, NouHgt avers that these allegations call for legal
26 conclusions to which no response is required. To the extent a response is deemed necessary,
27

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1 NouHgt is without knowledge or information sufficient to form a belief as to the truth of the
2 allegations contained therein, and therefore, denies the same.

3 23. In responding to paragraph 77 of Jerritt's Counterclaims, NouHgt avers that
4 these allegations call for legal conclusions to which no response is required. To the extent a
5 response is deemed necessary, NouHgt avers that Jerritt is not entitled to any of the relief
6 requested and is otherwise without knowledge or information sufficient to form a belief as to
7 the truth of the remaining allegations contained therein, and therefore, denies the same.

8 24. In responding to paragraph 78 of Jerritt's Counterclaims, NouHgt denies the
9 allegations contained therein.

10 **[JERRITT'S] FOURTH COUNTERCLAIM**

11 **DECLARATION THAT NO ROYALTIES ARE OWED PURSUANT TO THE**
12 **AMENDED LICENSE AGREEMENT**

13 25. In responding to paragraph 79 of Jerritt's Counterclaims, NouHgt reasserts,
14 realleges, and incorporates by this reference all prior responses as though fully set forth
15 herein.

16 26. In responding to paragraph 80 of Jerritt's Counterclaims, NouHgt is without
17 knowledge or information sufficient to form a belief as to the truth of the allegations
18 contained therein, and therefore, denies the same.

19 27. In responding to paragraph 81 of Jerritt's Counterclaims, NouHgt admits that
20 the parties have a dispute in controversy relative to Jerritt's obligation to continue to pay
21 royalties. As to the remaining allegations, NouHgt avers that these allegations call for legal
22 conclusions to which no response is required. To the extent a response is deemed necessary,
23 NouHgt is without knowledge or information sufficient to form a belief as to the truth of the
24 allegations contained therein, and therefore, denies the same

25 28. In responding to paragraph 82 of Jerritt's Counterclaims, NouHgt denies the
26 allegations contained therein.

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1 29. Any allegation that is deemed to have not been responded to is hereby
2 expressly denied.

3 **AFFIRMATIVE DEFENSES**

4 All possible affirmative defenses may or may not have been asserted herein insofar
5 as sufficient facts were not available to NouHgt after reasonable inquiry upon the filing of
6 this pleading and, therefore, NouHgt asserts the following defenses based in fact or upon
7 reasonable belief and hereby reserves the right to amend this Answer to allege appropriate or
8 additional defenses, if subsequent investigation or discovery so warrants.

9 **FIRST AFFIRMATIVE DEFENSE**

10 Jerritt's claims regarding the invalidity, unenforceability, misuse, and non-
11 infringement of the patent-in-suit, at least in part, fail to state a claim upon which relief can
12 be granted because the claims are not substantiated with sufficient facts to render them
13 plausible. Similarly, Jerritt's claims fail to give NouHgt fair notice of the claims being
14 asserted, since Jerritt references various provisions of patent law to allege numerous grounds
15 for invalidity, yet Jerritt identifies none these allegations with specificity, nor does Jerritt
16 provide sufficient facts on which to base such claims. Further, with respect to the
17 allegations of unenforceability of the patent-in-suit, Jerritt has failed to comply with FRCP
18 9(b), as Jerritt has failed to plead with particularity any facts, let alone facts which could
19 support any claim the patent holder acted fraudulently before the U.S. Patent and Trademark
20 Office upon which a claim for unenforceability could be substantiated.

21 **SECOND AFFIRMATIVE DEFENSE**

22 Jerritt's counterclaims are barred, in whole or in part, to the extent that the conduct,
23 action, or inaction of Jerritt constitutes an estoppel, laches, consent, or waiver.

24 **THIRD AFFIRMATIVE DEFENSE**

25 Jerritt is not entitled to equitable relief inasmuch as it has been guilty of inequitable
26 conduct and has failed to come into this action with clean hands, by virtue of its infringing
27 activities, as alleged in NouHgt's counterclaims, which are incorporated by reference, and

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1 consequently Jerritt is barred from reliance on and relief granted in equity by the doctrine of
2 unclean hands.

3 **FOURTH AFFIRMATIVE DEFENSE**

4 Jerritt's counterclaims are barred, in whole or in part, because the Patent and all of its
5 claims are valid, the Patent is enforceable, and the Patent is not being misused.

6 **FIFTH AFFIRMATIVE DEFENSE**

7 Jerritt's counterclaims are barred, in whole or in part, because the Licensing
8 Agreements at issue are valid and enforceable, and Jerritt has, through its actions, assented
9 to and/or otherwise ratified the terms of the Licensing Agreements and acknowledged the
10 validity and enforceability thereof.

11 **SIXTH AFFIRMATIVE DEFENSE**

12 Upon information and belief, Jerritt, by its acts, errors, omissions and conduct, is
13 barred and estopped from any recovery in this action, in whole or in part, because Jerritt has
14 infringed and continues to infringe NouHgt's Patent whether through direct infringement,
15 indirect infringement, or infringement through the doctrine of equivalents.

16 **SEVENTH AFFIRMATIVE DEFENSE**

17 Jerritt is not entitled to attorneys' fees and costs.

18 **EIGHTH AFFIRMATIVE DEFENSE**

19 Jerritt's claims are barred, in whole or in part, to the extent that the conduct of
20 NouHgt toward the U.S. Patent and Trademark Office was reasonable, justified, equitable,
21 lawful, and in good faith.

22 **NINTH AFFIRMATIVE DEFENSE**

23 Jerritt's claims are barred, in whole or in part, to the extent that NouHgt at all times
24 acted in good faith with reasonable and probable cause in procuring the Patent and entering
25 into the Licensing Agreements at issue.

26 **TENTH AFFIRMATIVE DEFENSE**

27 Jerritt's claims for attorneys' fees are barred, in whole or in part, to the extent that

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1 Jerritt has failed to allege an exceptional case as to support an award of attorneys' fees
2 pursuant to 35 U.S.C. § 285.

3 **ELEVENTH AFFIRMATIVE DEFENSE**

4 Jerritt's claims are barred, in whole or in part, to the extent that the acts of NouHgt
5 did not interfere with Jerritt's contracts with third persons.

6 **TWELFTH AFFIRMATIVE DEFENSE**

7 Jerritt's claims are barred, in whole or in part, to the extent that Jerritt failed to take
8 reasonable action to mitigate its damages.

9 **THIRTEENTH AFFIRMATIVE DEFENSE**

10 The relief sought by Jerritt is barred, in whole or in part, because at all times,
11 NouHgt's conduct was lawful and privileged.

12 **FOURTEENTH AFFIRMATIVE DEFENSE**

13 The damages complained of in Jerritt's claims were not factually, legally and/or
14 proximately caused by NouHgt's activities.

15 **FIFTEENTH AFFIRMATIVE DEFENSE**

16 Jerritt's claims and any damages claimed by Jerritt are the result of the acts of third
17 persons and not the acts of NouHgt.

18 **SIXTEENTH AFFIRMATIVE DEFENSE**

19 Jerritt's claims fail to state a claim against NouHgt upon which relief can be granted
20 for Patent Misuse.

21 **SEVENTEENTH AFFIRMATIVE DEFENSE**

22 Jerritt's claims are barred, in whole or in part, to the extent that there was no legal
23 misuse of the Patent.

24 **EIGHTEENTH AFFIRMATIVE DEFENSE**

25 At all times material to Jerritt's claims, NouHgt's activities have been in full
26 compliance with all applicable rules, regulations, codes, ordinances and/or statutes.

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1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 Jerritt's claims are barred, in whole or in part, to the extent that NouHgt did not enter
3 into an illegal or unlawful agreement to injure Jerritt.

4 **NOUGHT'S COUNTERCLAIMS AGAINST JERRITT CANYON GOLD, LLC**

5 Counterdefendant/Counterclaimant NouHgt Technologies, LLC ("NouHgt"), by and
6 through its attorneys of record, the law firm of Marquis Aurbach Chtd., alleges and
7 complains against Counterclaimants/Counterdefendants Jerritt Canyon Gold, LLC ("Jerritt")
8 and First Majestic Silver Corp. ("First Majestic," and together with Jerritt and the DOE and
9 ROE defendants, "Defendants") as follows:

10 **JURISDICTION AND VENUE**

11 1. Jurisdiction and venue for these Counterclaims are proper in this Court by
12 virtue of Jerritt's decision to appear and assert claims against NouHgt in this forum.

13 2. This Court has subject matter jurisdiction over this action pursuant to 28
14 U.S.C. §§ 1331 and 1338(a) and (b) both because it involves federal questions and also
15 because it involves patents.

16 3. This Court has supplemental jurisdiction over the subject matter of the Fourth
17 Claim for Relief pursuant to 28 U.S.C. § 1367.

18 4. This Court has *in personam* jurisdiction over Defendants because they
19 conduct business in this district and are engaged in patent infringement in this district.

20 5. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and
21 1400 because a substantial part of the events or omissions giving rise to the claim occurred
22 in this district, namely Defendants' unauthorized use of one or more processes that infringe
23 upon NouHgt's Asserted Patent.

24 **PARTIES**

25 6. NouHgt is a Nevada limited liability company with its principal place of
26 business in Elko, Nevada.

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1 7. Jerritt is also a Nevada limited liability company with its principal place of
2 business in Elko, Nevada.

3 8. Upon information and belief, First Majestic is a Canadian corporation with its
4 principal place of business in Vancouver, Canada but with operations and a continuing and
5 systematic presence in Mexico and throughout the United States, including its ownership of
6 the Jerritt Canyon Mine in Elko, NV.

7 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

8 **THE '148 PATENT**

9 9. On or about July 24, 2009, a provisional application was filed with the U.S.
10 Patent and Trademark Office ("USPTO"), on behalf of Inventor Graham Dickson ("Mr.
11 Dickson"), relating to the Asserted Patent.

12 10. Thereafter, on or about July 22, 2010, a non-provisional patent application
13 ("Non-Provisional Application") was filed with the USPTO.

14 11. The Non-Provisional Application No. 12/841,783 (the "Application") was
15 published by the USPTO as Pub. No. US 2011/0027153 A1, on February 3, 2011.

16 12. On or about November 4, 2014, the USPTO issued U.S. Patent No. 8,877,148
17 ("148 Patent" or the "Asserted Patent"), titled "Apparatus and Method for Removing
18 Mercury From A Gas."

19 13. A true and correct copy of the '148 Patent is attached hereto as **Exhibit A**.

20 14. The USPTO applied a patent term adjustment, or PTA, of 246 days, making
21 the expiration of the '148 Patent set to be March 25, 2031.

22 15. On or about March 31, 2011, Mr. Dickson assigned and conveyed to Celec,
23 Inc. ("Celec") of British Columbia, Canada, his entire right, title, and interest in and to the
24 "Application and all substitute, continuation, continuation-in-part and divisional applications
25 based in whole or in part on the Patent Application, and including all patents resulting
26 therefrom and all reissues and extensions thereof, and including any and all rights of priority
27 resulting from the filing of any such applications within the United States."

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1 16. On May 5, 2015, Celec executed an assignment with an effective date of May
2 31, 2011, whereby Celec assigned and conveyed to NouHgt its entire right, title, and interest
3 in and to the '148 Patent "and all substitute, continuation, continuation-in-part and divisional
4 applications based in whole or in part on the Patent, and including all patents resulting
5 therefrom and all reissues and extensions thereof, and including any and all rights of priority
6 resulting from the filing of any such applications within the United States."

7 17. Thus, NouHgt is the legal owner of the '148 Patent and has been at all times
8 relevant hereto.

9 18. The '148 Patent generally relates to the use of a chlorine solution reacting
10 with gas-borne mercury to form mercuric chloride so as to reduce the mercury emissions to
11 more environmentally-friendly levels.

12 19. The '148 Patent is comprised of six claims, only one of which is independent
13 and exemplary in this action:

14 A method for reacting gas borne mercury with chlorine solution to form
15 mercuric chloride, the method comprising: contacting a mercury bearing gas
16 with chlorine Solution at a pH of between about 6.8 and 7.0 and at a
temperature of less than about 40°C.1 and wherein said chlorine solution has
a flow rate of about 10.7 gpm/ft.

17 Ex. A ('148 Patent), at col. 15, ll. 9–15.

18 20. The gaseous mercury is adsorbed on the surface of the solution where it then
19 reacts with the chlorine gas in solution to form mercuric chloride.

20 21. The resulting mercuric chloride can also react with the gaseous mercury on
21 the surface of the solution to form mercurous chloride, which is a solid and which then
22 precipitates.

23 22. The reaction with chlorine is much faster and leads to much better scrubbing
24 and much lower emissions (by a factor of over 50), than if just scrubbed with mercuric
25 chloride.

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1 23. The first (3.5-year) and second (7.5-year) maintenance fees for the '148
2 Patent have been paid, and the third (11.5-year) maintenance fee has not yet become due.
3 *See Exhibit B.*

4 24. All of claims of the '148 Patent are valid, and the '148 Patent is enforceable.

5 **THE LICENSE AGREEMENTS**

6 25. On or about May 31, 2011, NouHgt entered into a License Agreement ("First
7 Agreement") with Veris Gold Corp. ("Veris"), licensing Veris' use of the '148 Patent.

8 26. On or about May 19, 2015, NouHgt entered into an Amended License
9 Agreement ("Amended Agreement") with Veris, which effectively terminated the First
10 Agreement and granted Veris a perpetual license to use the '148 Patent at the Jerritt Canyon
11 Mine in Elko County, Nevada.

12 27. The Jerritt Canyon Mine, like all Nevada facilities must by law use
13 Maximum Achievable Control Technology ("MACT") for its mercury emissions.

14 28. Over a three-year period of testing, nearly every month, it was determined
15 that the MACT for the Jerritt Canyon Mine is scrubbing of the "off gases" by a water
16 solution containing chlorine gas, *i.e.*, NouHgt's technology as taught by the '148 Patent.

17 29. Pursuant to the Amended Agreement, Veris agreed to pay NouHgt a per ton
18 royalty on throughput produced by the Jerritt Canyon Mine beginning on July 1, 2015, and
19 on the first day of each successive month thereafter.

20 30. Jerritt is the successor-in-interest to Veris and, upon information and belief,
21 continues to use the '148 Patent at the Jerritt Canyon Mine while refusing to pay the agreed-
22 upon royalties for such use, making Jerritt's use of the '148 Patent unauthorized.

23 31. Under Section 10, the Amended Agreement only terminates "(a) At such time
24 as the Parties mutually agree in writing; or (b) At any time at the option of either Party, if
25 the other Party materially defaults in the performance or observance of any of its obligations
26 and fails to remedy the default within thirty (30) days after receiving a written demand to do
27 so from the Party who is not in default."

NOUHGT ASSIGNS ITS RIGHTS TO RECEIVE ROYALTY PAYMENTS

32. On or about August 19, 2019, NouHgt entered into an Assignment (“Assignment”) with Nevada Select Royalty, Inc. (“Nevada Select”).

33. Pursuant to the Assignment, Jerritt signed an Acknowledgment and Consent to Assignment of Royalty Payments Agreement (“Acknowledgment”), confirming that Jerritt would make subsequent royalty payments under the Amended Agreement to Nevada Select.

JERRITT CEASES PAYING FOR ITS LICENSE TO USE THE ’148 PATENT

34. Upon information and belief, on or about January 7, 2022, First Majestic sent a letter (“Termination Letter”), expressly on behalf of Jerritt, to NouHgt and Nevada Select’s parent company(ies), Gold Royalty Corp. and Ely Gold Royalties, Inc., purporting to unilaterally terminate the Amended Agreement, in violation of the Amended Agreement’s terms, and ceased paying royalties to Nevada Select, in violation of the Assignment and the Acknowledgment.

35. Jerritt purports to have “hired a consultant” (“DOE Consultant”), with an unidentified consulting firm (“ROE Consulting Firm”) who, after “studying the process and results concluded that the pH range specified in the Patent [between about 6.8 and 7.0] was inefficient and not performing and therefore recommended changing the manufacturing parameters to operate outside of the pH range specified in the Patent.” ECF No. 1-2 (Countercl.) at 11, ¶ 61.

36. According to Jerritt, it changed its operating permit “to specify the new pH parameters that would be utilized” at the Jerritt Canyon Mine. *Id.* at ¶ 62.

37. However, according to the Mercury Operating Permit issued by the Nevada Department of Environmental Protection (“NDEP”), dated July 13, 2022, the Mercury Scrubber – one piece of equipment utilizing the process taught by the ’148 Patent – “shall operate with a pH set point of 6.9,” precisely within the approximate pH range taught by the Asserted Patent.

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1 38. Upon information and belief, systems or process units of statutorily-defined
2 tier-1 thermal units that emit mercury at Jerritt Canyon Mine include, without limitation,
3 Jerritt's east and west roasters and the refinery and carbon regeneration kiln. *See* NEV.
4 ADMIN. CODE § 445B.3651(4).

5 39. Upon information and belief, the technologies for control of mercury
6 emissions used in the aforementioned systems and process units, other than the mercury
7 scrubber, include, without limitation, Jerritt's gas quench scrubber, venturi dust scrubber,
8 sulfur dioxide (SO₂) scrubber, tail gas scrubber, sodium hypochlorite injection system, and
9 venturi mercury wet-scrubbing/carbon-polishing system. *See* NEV. ADMIN. CODE §
10 445B.3651(4).

11 40. Notwithstanding Jerritt's position that it made a slight variation in the pH
12 level of the chlorine solution used, if there are any differences between the process used by
13 Jerritt and the process taught by the '148 Patent (which NouHgt disputes), then in order to
14 continue in compliance with the Nevada Mercury Control Program, any such differences
15 would have to be insubstantial to a person of ordinary skill in the art.

16 41. Jerritt asserts no other variation in its process other than to the pH of the
17 solution used, so, upon information and belief, it is undisputed that Jerritt's process used to
18 remove mercury from gas in the operations at the Jerritt Canyon Mine practice every
19 limitation of the Asserted Patent.

20 **JERRITT CONTINUES TO WILLFULLY INFRINGE THE '148 PATENT, LITERALLY OR UNDER**
21 **THE DOCTRINE OF EQUIVALENTS**

22 42. Jerritt's infringement has been, and continues to be, knowing, intentional, and
23 willful.

24 43. Jerritt had pre-suit knowledge of the '148 Patent as demonstrated by its
25 predecessor-in-interest's execution of the Amended Agreement, recognition of the validity
26 of the claims in the '148 Patent, and commitment to pay to use the Asserted Patent.

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1 44. Furthermore, Jerritt's pre-suit knowledge of the validity of all claims of the
2 '148 Patent, and its enforceability, is evidenced by Jerritt's consistent and continued
3 payment of royalties to NouHgt, or its assignee pursuant to the Amended Agreement and
4 Acknowledgement and Assignment, respectively.

5 45. The willfulness of Jerritt's infringement is further demonstrated by the air
6 quality permit issued by NDEP in July 2022, which requires Jerritt to operate its Mercury
7 Scrubber with a pH set point of 6.9, which is directly within the range taught by the Asserted
8 Patent's exemplary claim 6.

9 46. In the Specification of the '148 Patent, it even teaches that "[i]n alternative
10 embodiments the chlorine solution is at a pH of between about 6.5 and about 7.5 ... " Ex. A
11 at col. 2, ll. 21–22.

12 47. The Specification further provides this:

13 In embodiments the pH of the chlorine solution in mercury scrubber
14 (I) may be optimised to promote the reaction between elemental mercury and
15 dissolved chlorine gas. The chlorine solution may also contain mercuric
16 chloride and may contain a pH adjusting agent Such as Soda ash. In
17 embodiments the pH of the chlorine solution in mercury scrubber (I) **may be**
between about 6 and 8, and may be between about 6.5 and 7.5 and may be
between about 6.7 and 7.2 and may be between about 6.8 and 7.0 and in
particular embodiments may be about 6.9.

18 *Id.* at col. 7, ll. 13–22 (emphases added).

19 48. Jerritt continues to use the process taught by the '148 Patent, but it avers that
20 it has changed the pH of the chlorine solution used in that process, which averment is
21 demonstrably false; therefore, Jerritt has been and continues to be directly and willfully
22 infringing the Asserted Patent.

23 49. The pH range listed in the MACT process is one where the dissolved chlorine
24 has the highest Oxidation Reduction Potential and produces the fastest reaction rates with
25 the dissolved chlorine gas.

26 50. Indeed, test work completed by outside laboratories and sanctioned by NDEP
27 showed that moving the solution pH outside of the stated pH parameters, even slightly,

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1 produced emissions that were 25 times greater than emissions produced when the
2 parameters were properly observed.

3 51. Jerritt is, no doubt, aware of the history of the Jerritt Canyon Mine that it is
4 now operating, including its closure in or around 2008, when the Sierra Club is believed and
5 understood to have put pressure on the U.S. Environmental Protection Agency (“EPA”),
6 which in turn put pressure on NDEP relating to the Jerritt Canyon Mine’s emissions.

7 52. Upon information and belief, the only way to resolve the Jerritt Canyon
8 Mine’s excess mercury emissions at that time was to implement the process taught by the
9 ’148 Patent in order to produce emissions that were approximately 16 times lower than that
10 being suggested at that time by the Sierra Club and the EPA.

11 53. Even if Jerritt’s assertion that its slight variation of the pH of the chlorine
12 solution used in the process taught by the ’148 Patent does not constitute literal
13 infringement, Jerritt is still directly infringing under the doctrine of equivalents.

14 54. To wit, upon information and belief, to the extent Jerritt is not literally
15 infringing the ’148 Patent, Jerritt’s operation is believed to be doing the same work (*i.e.*,
16 removing mercury from a gas), in substantially the same way (*i.e.*, “reacting gas borne
17 mercury with chlorine solution to form mercuric chloride, the method comprising:
18 contacting mercury bearing gas with chlorine solution at a pH of between about 6.8 and
19 7.0”), to accomplish substantially the same result (*i.e.*, reduction or removal of mercury
20 from gas).

21 FIRST CLAIM FOR RELIEF

22 (Direct Patent Infringement – Against Jerritt)

23 55. NouHgt repeats, realleges, and incorporates by this reference all allegations
24 previously asserted as though fully set forth herein.

25 56. NouHgt owns the ’148 Patent, all of the claims of which are valid, and which
26 Asserted Patent is fully enforceable.

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1 57. As set forth in detail above, Jerritt has willfully infringed and continues to
2 willfully infringe the '148 Patent either literally or under the doctrine of equivalents.

3 58. Upon information and belief, Jerritt has been notified by Nevada Select of its
4 unauthorized use of the process taught by the '148 Patent without payment, and
5 consequently has been made aware of its infringement.

6 59. Jerritt's acts of infringement of the '148 Patent have directly and proximately
7 caused and will continue to directly and proximately cause NouHgt damages for which
8 NouHgt is entitled to compensation pursuant to 35 U.S.C. § 284.

9 60. This case is also exceptional and, therefore, NouHgt is entitled to an award of
10 attorneys' fees pursuant to 35 U.S.C. § 285.

11 **SECOND CLAIM FOR RELIEF**

12 **(Contributory Patent Infringement –**

13 **Against DOE Consultant and ROE Consulting Firm)**

14 61. NouHgt repeats, realleges, and incorporates by this reference all allegations
15 previously asserted as though fully set forth herein.

16 62. DOE Consultant and ROE Consulting Firm had knowledge of Jerritt's
17 infringing activity "after studying the process and results."

18 63. DOE Consultant and ROE Consulting Firm then intentionally induced or
19 encouraged Jerritt to directly infringe the Asserted Patent when they, upon information and
20 belief, apparently instructed Jerritt to vary the pH of the chlorine solution used in the
21 patented process ever-so-slightly, purportedly in an attempt to fabricate an argument that
22 Jerritt was avoiding literal infringement of the '148 Patent.

23 64. Upon information and belief, DOE Consultant and ROE Consulting Firm
24 knew or reasonably should have known that only a very minor change in the pH level of the
25 chlorine solution use in Jerritt's Mercury Scrubber would not avoid practice of the process
26 taught by the '148 Patent.

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1 72. As a direct and proximate result of First Majestic's vicarious infringement,
2 NouHgt has been damaged in an amount to be determined at trial.

3 **FOURTH CLAIM FOR RELIEF**

4 **(Intentional Interference With Contractual Relations –**
5 **Against Jerritt and First Majestic)**

6 73. NouHgt repeats, realleges, and incorporates by this reference all allegations
7 previously asserted as though fully set forth herein.

8 74. NouHgt has a current contractual relationship with Nevada Select, *i.e.*, the
9 Assignment.

10 75. Jerritt and First Majestic knew of this contractual relationship.

11 76. Jerritt and First Majestic intended to harm NouHgt by interfering in that
12 contractual relationship by refusing to pay Nevada Select for use of NouHgt's '148 Patent.

13 77. Jerritt and First Majestic had no privilege or justification to interfere with this
14 contractual relationship.

15 78. As a direct and proximate cause of Jerritt's and First Majestic's intentional
16 interference with the contractual relationship between NouHgt and Nevada Select, NouHgt
17 has been damaged in an amount to be determined at trial.

18 79. As a direct and proximate cause of Jerritt's and First Majestic's intentional
19 interference with the contractual relationship between NouHgt and Nevada Select, which
20 was characterized by fraud, oppression or malice, express or implied, NouHgt is entitled to
21 an award of punitive damages, in an amount to be proven at trial.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, NouHgt rays for judgment against Defendants as follows:

24 80. Judgment in its favor and against defendants, and each of them, on all of its
25 causes of action, in an amount to be proven at trial;

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1 81. For a declaration that Jerritt has not and cannot meet its burden to
2 demonstrate that any of the claims of the '148 Patent is invalid, and consequently, that the
3 Asserted Patent is fully enforceable;

4 82. For an award of punitive damages against defendants in an amount to be
5 proven at trial;

6 83. For an award of reasonable attorney fees;

7 84. For costs of suit;

8 85. For pre-judgment interest;

9 86. For post-judgment interest; and

10 87. For any further relief as the Court deems to be just and proper.

11 Dated this 7th day of November, 2022.

12 MARQUIS AURBACH

13 By /s/ **Jared M. Moser**

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22 *Attorneys for Counterdefendant/Counter-*
23 *claimant NouHgt Technologies, LLC*
24
25
26
27

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **COUNTERDEFENDANT NOUHGT TECHNOLOGIES, LLC'S ANSWER TO JERRITT CANYON GOLD, LLC'S COUNTERCLAIMS AND NOUHGT TECHNOLOGIES, LLC'S COUNTERCLAIMS AGAINST JERRITT CANYON GOLD, LLC** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on the 7th day of November, 2022.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

☐ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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